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In The

Supreme Court of the United States

October Term, 1949.

No. ————

EMIL PLACEK and BANK OF PRAGUE, PRAGUE, NEBRASKA, A CORPORATION, PETITIONERS.

V.

M. D. EDSTROM, AS COUNTY ATTORNEY OF SAUNDERS COUNTY, NEBRASKA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

C. PETRUS PETERSON,
ROBERT W. DEVOE,
312 Bankers Life Bldg.,
Lincoln, Nebraska,

To the Hon. Fred M. Vinson, Chief Justice of the United STATES, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for a Writ of Certiorari to review the judgment of the Supreme Court of Nebraska entered April 22, 1949, affirming the judgment of the District Court of Saunders County, Nebraska, in favor of respondent and against petitioners (R.23) and the judgment entered June 21, 1949, denying rehearing (R. 33).

B.

JURISDICTION.

The jurisdiction of this court is invoked under Title 28 United States Code, Sec. 1257, on the ground that in said cause, wherein said judgment was rendered, there was drawn in question the validity of a statute of the State of Nebraska on the ground of its being repugnant to the Constitution of the United States. The authorities relied on to sustain such jurisdiction are:

Western Turf Assn. v. *Greenberg,* 204 U. S. 359, 51 L. Ed. 520, 27 S. Ct. 384.

James Stewart & Co. v. *Sudrakula,* 309 U. S. 94, 84 L. Ed. 596, 60 S. Ct. 431.

C.

THE STATE STATUTE INVOLVED.

The statute involved is Sec. 8-163.01, R. S. Supp. Neb. 1947, and is as follows:

"8-163.01. All checks drawn on any bank or trust company organized under the laws of this

state shall be cleared at par by the bank or trust company on which they are drawn; provided, the foregoing direction shall not be applicable where checks are sent to banks or trust companies as special collection items."

D.

QUESTION PRESENTED.

The court below construed said statute as prohibiting a drawee bank and an out of town bank which forwards checks drawn on the drawee bank for remission of the proceeds thereof, from entering into an express contract, before the checks are charged to the account of the maker in the drawee bank, under the terms of which contract the forwarding bank agreed to pay for a draft in making the remittance of the proceeds of the checks so forwarded in consideration of the waiver on the part of the drawee bank of its right to pay checks only over its own counter.

Thus construed, the only question presented is whether the Act so construed is repugnant to the due process clause of the Constitution of the United States as a wrongful, arbitrary and unreasonable restraint upon the freedom of contract guaranteed thereunder.

E.

MATERIAL FACTS.

(1) *The parties.* The petitioner, Bank of Prague (a plaintiff and appellant below), is a State Bank organized under the laws of the State of Nebraska, and the other petitioner, Emil Placek, is the president of said bank.

The respondent, M. D. Edstrom (appellee below), was and is the duly elected County Attorney of Saunders County, Nebraska.

(2) *Nature of action.* This suit was for the determination of the question of the construction and constitutional validity of said Act as applied to the banking transactions involved and for a declaratory judgment, declaring the rights, status and other legal relations of the petitioners under the facts pleaded and to enjoin the respondent from instituting any criminal prosecution against the petitioners, or either of them, based upon the provisions of said Act, as applied to said transactions.

The amended petition (R.1) alleged generally, in two separate causes of action, that the petitioner bank, acting through petitioner Placek, entered into contracts, one with the First National Bank of Kansas City, Missouri (R.3), and the other with the First National Bank of Omaha, Nebraska (R.6), under the terms of which the forwarding banks agreed to a deduction from the proceeds of checks forwarded in each cash letter of an exchange charge of 10 cents per one hundred dollars computed on the total amount of each remittance in consideration of the waiver on the part of petitioner bank of its right to require presentment of the checks over the counter of the bank; that the Act, if construed as rendering said contracts invalid and unenforceable, is repugnant to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States (First Cause of Action [R.3], Second Cause of Action [R.6]).

The respondent filed separate general demurrers to both causes of action (R.20) which were sustained by the trial court. The petitioners thereupon elected not to plead further and the trial court thereupon dismissed both causes of action (R.20).

A third cause of action is not here involved.

F.

GROUNDS FOR DECISION BELOW.

The Supreme Court of Nebraska affirmed the decision of the trial court as to both causes of action and held that the Act did not unreasonably deprive state banks of their right to contract or deprive them of due process or equal protection of the laws (R.23), 151 Neb. 225, 37 N. W. (2d) 203.

The petitioners filed a motion for rehearing in the Supreme Court of Nebraska on May 11, 1949, reasserting the unconstitutionality of the Act as repugnant to the due process clause of the Federal Constitution (R. 32). This motion was overruled and rehearing denied on June 21, 1949 (R.33).

G.

REASONS FOR GRANTING THE WRIT.

(1) The court below has decided a federal question which has not heretofore been directly or specifically determined by this Court as applicable to such issues and the decision is not in accord with the decisions of this Court with respect to liberty of contract guaranteed under the due process clause of the Federal Constitution:

a. The statute involved, as construed by the court below, is not a reasonable exercise of the police power of the state from the standpoint of the decisions of this Court interpreting the exercise of the police power in connection with the Fourteenth Amendment.

b. The court below, under the guise that the Act involved was enacted as a proper and legitimate exercise of the police power of the state, held that freedom of contract guaranteed under the Fourteenth Amendment must yield to the legislative provisions.

c. The decision below cannot be sustained as involving purely a non federal question, namely, the right of the state to legislate within the field of its police power.

d. The question is of importance and substance and of public as well as private concern affecting directly all state banks of Nebraska which are not affiliates and which are not non member clearing banks of the Federal reserve System and the decision has an impact upon all such banks in the United States.

Wherefore, your petitioners pray that a Writ of Certiorari be granted under the seal of this Court directed to the Supreme Court of Nebraska, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and for such further relief as to this Court may seem proper.

C. PETRUS PETERSON,

ROBERT W. DEVOE,
312 Bankers Life Bldg.,
Lincoln, Nebraska.

Dated this 13th day of October, 1949.

In The

Supreme Court of the United States

October Term, 1949.

No. ————

EMIL PLACEK and BANK OF PRAGUE, PRAGUE, NEBRASKA, A CORPORATION, PETITIONERS.

V.

M. D. EDSTROM, AS COUNTY ATTORNEY OF SAUNDERS COUNTY, NEBRASKA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

A.

OPINIONS BELOW.

The judgment of the District Court of Saunders County, Nebraska (R.20), is unreported. The opinion of the Supreme Court of Nebraska of April 22, 1949, is reported in 151 Neb. 225, 37 N. W. (2d) 203. The order denying the motion for rehearing of June 21, 1949 (R.33), is unreported.

B.

JURISDICTION.

In addition to the statements and citations contained in the petition (supra) it is contended that the Supreme Court of the United States has jurisdiction to review the judgment below because:

1. The judgment of the Supreme Court of Nebraska entered April 22, 1949, (R.23) and the order entered on June 21, 1949, overruling the motion for rehearing (R.33) constitute a final judgment.

Dept. of Banking, State of Neb. v. *Pink*, 317 U. S. 264, 87 L. Ed. 254, 63 S. Ct. 233.

Citizens Bank v. *Opperman*, 249 U. S. 448, 63 L. Ed. 701, 39 S. Ct. 330.

2. The judgment sought to be reviewed is by the highest court of the State of Nebraska in which a decision could be had.

Art. V, Sec. 1, Const. of Neb.

3. The federal question sought to be reviewed was properly raised and preserved in the courts of Nebraska by

(a) A specific allegation in the amended petition to the effect that said act, if construed as prohibiting the making of exchange charges for the remittance of the proceeds of forwarded checks under the facts and circumstances alleged, is repugnant to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States (R.11).

(b) By motion for rehearing (R.32).

4. The court below considered and decided the federal question in its decision and opinion of

April 22, 1949 (R.23), 151 Neb. 225, 37 N. W. (2d) 203, which decision was adhered to in its order overruling the motion for rehearing on June 21, 1949 (R.33).

Chicago R. I. & P. R. Co. v. *Perry*, 259 U. S. 548, 551, 42 S. Ct. 524, 66 L. Ed. 584.

5. In this cause there was drawn in question the validity of a statute of the State of Nebraska on the ground of its being repugnant to the Constitution of the United States, and the decision of the lower court denying the federal claim asserted may be reviewed by this court by certiorari.

Title 28, United States Code, Sec. 1257.

6. The judgment of the Supreme Court of Nebraska does not rest upon a non federal ground which independently and adequately supports its judgment. The holding of the court below that the act involved is a legitimate exercise of the police power is not conclusive upon this court.

Where legislation of this character is assailed as invading the Fourteenth Amendment this court may review the question of whether the legislation is a reasonable and appropriate exercise of the police power of the state.

Lochner v. *New York*, 198 U. S. 45, 49 L. Ed. 937, 25 S. Ct. 539.

Ward & Gow v. *Krinsky*, 259 U. S. 503, 66 L. Ed. 103, 42 S. Ct. 529.

Louis K. Liggett Co. v. *Baldridge*, 278 U. S. 105, 73 L. Ed. 204, 49 S. Ct. 57.

C.

STATUTE INVOLVED.

Sec. 8-163.01, R. S. Supp. Neb. 1947, quoted in petition.

D.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Nebraska erred:

(1) In holding that Sec. 8-163.01, R. S. Supp. Neb. 1947, as construed by the court, is not repugnant to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) In holding that said act, as construed by it in its opinion, is a fair and reasonable exercise of the police power of the state and that it did not "unreasonably deprive state banks of their right to contract or deprive them of due process or equal protection of the laws." (Quote from Syl. 1, Op. R.23).

(3) In holding that freedom of contract guaranteed under the Fourteenth Amendment to the Federal Constitution must yield to the terms of the act, as construed, on the theory that, as construed, the act was a reasonable exercise of the police power.

E.

ARGUMENT.

It must be conceded that in the absence of the act, the contracts which were entered into by the petitioner bank and the forwarding banks are valid and enforceable contracts entered into by parties competent to contract and supported by a valid consideration, namely, the promise on the part of the forwarding banks to pay the exchange charge for the remission of the proceeds of the checks in consideration of the waiver on the part of the petitioner bank of its right to insist

on paying the checks over its counter,—contracts which would fall within the protection of the liberty of contract guaranteed under the 14th Amendment, in the absence of valid statutory prohibition.

If the contracts are not within the protection of the due process clause of the Federal Constitution, it is because the act involved was enacted within the legitimate exercise of the police power of the state.

Petitioners contend that the act construed as prohibiting the entering such contracts cannot be justified as a legitimate and proper exercise of the police power of the state. That the act so construed bears no real and substantial relation to the public welfare. That the contracts relate to isolated individual transactions between the banks and are not in themselves inimical to the public welfare. That the prohibition of the performance of the contracts serves no public purpose. That no one is interested except the contracting parties and that the public has no such interest in the performance of the contracts that they may be prohibited under the exercise of the police power. That the public has no more interest in this character of transaction than it would have in a transaction where the forwarding bank, under a contract with the drawee bank, agreed to pay the drawee bank for delivering the proceeds at the banking house of the forwarding bank for a consideration agreed upon between them.

Public interest, if any, lies in non-interference with the contracts entered into, the effect of which saves the holders of checks the expense and inconvenience of traveling to the banking house of the drawee bank in order to receive payment of their checks over the counter.

This court is not foreclosed by the decision of the state court that the prohibition of the contracts and the performance thereof fall within the legitimate exercise of the police power. That question may be reviewed, re-examined and an independent decision arrived at with respect to whether the legislation in question is a reasonable and appropriate exercise of the police power of the state.

In the case of *Lochner* v. *New York*, 198 U. S. 45, 49 L. Ed. 937, 25 S. Ct. 539, this court said:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, * * *
>
> "It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of

person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

This court laid down the rule in the 4th Syllabus of the case of *Ward & Gow* v. *Krinsky*, 259 U. S. 503, 42 S. Ct. 529, 66 L. Ed. 103, as follows:

"4. The Federal Supreme Court, while bound by the construction of a state statute adopted by the state court of last resort, is not concluded by its reasoning, but must exercise an independent judgment when called upon to determine the Federal question whether the act, as construed and applied, is repugnant to the restrictions of the Federal Constitution."

This court said in *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 73 L. Ed. 204, 49 S. Ct. 204:

"The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the 14th Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. Here the pertinent question is: What is the effect of mere ownership of a drug store in respect to the public health?"

CONCLUSION.

It is therefore respectfully submitted that the Writ of Certiorari should be granted and that the judgment of the Supreme Court of Nebraska should be reversed.

C. PETRUS PETERSON,
312 Bankers Life Bldg.,
Lincoln, Nebraska,

ROBERT W. DEVOE,
312 Bankers Life Bldg.,
Lincoln, Nebraska.